

What is the extent of claimant's functional impairment? Respondent requests the Board to find claimant sustained a 1 percent functional impairment to his right hand as opined by the treating physician, Jeffrey R. Dillow, M.D. In the alternative, respondent requests the Board to average Dr. Dillow's rating with the rating provided by claimant's medical expert, P. Brent Koprivica, M.D. Conversely, claimant requests the Board to affirm the July 3, 2008 Award. Claimant contends Dr. Koprivica's evaluation and findings provide a more accurate representation of claimant's functional impairment.

FINDINGS OF FACT

Claimant began working for respondent in 1990. Claimant's job entailed repairing damage caused by respondent's vehicles. This included traveling to locations where the damage occurred, and included using various tools and materials to complete the repairs. On October 17, 2006, claimant suffered an injury when a power drill bit caught and the resulting torque caught claimant's hand, breaking the fourth metacarpal on his right hand.

Claimant came under the care of plastic surgeon Jeffrey R. Dillow, M.D. On October 24, 2006, claimant underwent a surgical repair of the fracture, involving the placement of a plate with screws in his right hand. Dr. Dillow's notes following the surgery note a steady improvement in claimant's condition. By November 29, 2006, Dr. Dillow reported claimant as having a full range of motion, with the swelling going down and the scar healing. Claimant was then referred for rehabilitation. By April 25, 2007, claimant's scar was basically invisible, with his range of motion and function described as normal. Utilizing the fourth edition of the *AMA Guides*,¹ Dr. Dillow rated claimant at 1 percent for his scar, but otherwise found claimant to have a normal examination as the result of this accident and surgery. Dr. Dillow's reports do not discuss the method used in evaluating claimant's range of motion or any other functions of claimant's hand, including any tests done on claimant's grip strength. Claimant testified that Dr. Dillow had claimant grip his finger, which claimant stated was the only test on claimant's grip used by the doctor.

Claimant was referred by his attorney to board certified emergency medicine specialist P. Brent Koprivica, M.D., for an examination on June 6, 2007. Claimant displayed limited range of motion and limited grip strength during the examination. The grip strength tests displayed a marked difference between claimant's right hand and his left hand. This is significant as claimant is right-hand dominant. Dr. Koprivica's report details the kilogram grip strength losses and the range of motion degree losses in detail. Additionally, Dr. Koprivica listed five separate grip strength tests as recommended by the fourth edition of the *AMA Guides*² and detailed the limited degrees on the range of motion tests as well. He rated claimant as having a 42 percent strength loss in the right hand which equates to a 20 percent functional impairment to the upper extremity or a 22 percent impairment to the hand. This rating was pursuant to the fourth edition of the *AMA Guides*.³ Dr. Koprivica noted that claimant's grip strength test demonstrated a bell-type distribution

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

² *AMA Guides* (4th ed.).

³ *AMA Guides* (4th ed.).

and claimant was felt to be appropriate under Waddell's criteria for symptom magnification. Both indicate good effort on claimant's part during the tests.

At the regular hearing in this matter, claimant discussed significant ongoing problems with his range of motion and grip strength. Claimant discussed difficulties with gripping and twisting tools while at work and also testified to ongoing pain in his hand. These symptoms are discussed in Dr. Koprivica's report, but not in the reports of Dr. Dillow.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁶

A claimant's testimony alone is sufficient evidence of his own physical condition.⁷

Respondent argues that claimant's impairment rating should either be that of Dr. Dillow, the treating physician, or, at the very least, the ratings of Dr. Dillow and Dr. Koprivica should be averaged. However, the burden of proof in workers compensation litigation in Kansas is by a preponderance of the credible evidence. In this case, the most credible evidence appears to be that of Dr. Koprivica. Not only did Dr. Koprivica list in detail the results of his testing, but he also appeared to follow the mandates of the fourth

⁴ K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 2007 Supp. 44-501(a).

⁷ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

edition of the *AMA Guides*⁸ with regard to the way he tested claimant's grip strength and range of motion. Dr. Dillow, while being a very competent surgeon, at least in the opinion of Dr. Koprivica, failed to indicate how or if claimant was tested. Additionally, claimant's testimony regarding his ongoing symptoms is more in line with the findings of Dr. Koprivica than Dr. Dillow. The Board finds the rating opinion of Dr. Koprivica to carry more weight than that of Dr. Dillow. Therefore, the finding by the ALJ that claimant suffered a 22 percent impairment to his right hand should be affirmed.

CONCLUSIONS

Claimant has satisfied his burden of proof that he suffered a 22 percent permanent partial impairment to his right hand as a result of the injuries suffered on October 17, 2006 while working for respondent.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁹ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated July 3, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

⁸ *AMA Guides* (4th ed.).

⁹ K.S.A. 2007 Supp. 44-555c(k).

Dated this ____ day of November, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Ryan T. Linville, Attorney for Claimant
Michael P. Bandre, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge